

***United States Court of Appeals
for the Second Circuit***



**INTERVENOR'S
BRIEF**

77 4079

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No. 77-4079

NEW YORK STATE COMMISSION ON CABLE TELEVISION,

Petitioner,

-against-

FEDERAL COMMUNICATIONS COMMISSION and
UNITED STATES OF AMERICA,

Respondents,

MANHATTAN CABLE TELEVISION, INC. and NEW YORK
STATE CABLE TELEVISION ASSOCIATION,

Intervenors.

ON PETITION FOR REVIEW OF AN ORDER OF
THE FEDERAL COMMUNICATIONS COMMISSION

BRIEF FOR INTERVENOR
NEW YORK STATE CABLE TELEVISION ASSOCIATION

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September 30, 1977

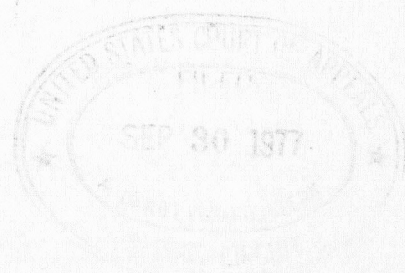


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Preliminary Statement

Intervenor New York State Cable Television Association ("NYCTA") submits this brief in support of the ruling of respondent Federal Communications Commission ("FCC"), in which the FCC construed a limited grandfathering provision in its rule setting maximum limits on the state and local fees which can be levied on cable television systems.

The FCC's interpretation of its own rule, entitled to controlling weight unless simply arbitrary, effectuates the expressed purpose of the grandfather provision by permitting non-compliant fees which antedated the rule to remain in effect for an interim period, thus alleviating any dislocations which the fee limits might otherwise cause. The contrary interpretation urged by petitioner New York State Commission on Cable Television ("CCT") contravenes the purpose of the grandfather provision and of the fee limitation itself. Under CCT's reading of the rule, the FCC would have declared open season, authorizing the subsequent imposition of new non-compliant fees on any cable system simply because the system itself was in operation when the fee limitation was imposed.

We respectfully submit that CCT's reading should be rejected, and that this Court should affirm the FCC's interpretation of its own rule.

Question Presented

Whether this Court should set aside the FCC's interpretation of the grandfather provision in the FCC's cable fee limitation rule, 47 CFR § 76.31(b), as plainly erroneous and inconsistent with the rule.

Position of NYCTA

NYCTA is a trade association whose membership includes the majority of cable television operators in New York State. NYCTA participated in the proceedings before t and supports its interpretation of its grandfather c On April 26, 1977, this Court granted NYCTA's motion for intervention in this proceeding.

Rule Involved

The full text of 47 CFR § 76.31(b) is set out at page 2 of the FCC's brief.

Statement of the Case

NYCTA adopts and relies on the counterstatement of facts contained in the brief of the FCC. While we will try to avoid repeating what the FCC has said, we emphasize the following facts to demonstrate that the FCC's interpretation of its own rule is clearly correct.

1. The History of the Grandfather Clause

The grandfather clause at issue in this case was intended to permit the continued existence, during a transition period, of fees in excess of FCC limits which were already in existence when those limits were imposed. The history of the rule, both before and after its adoption, makes this clear.

The purpose of grandfathering was stated unambiguously at the outset of the rulemaking proceeding which led to the adoption of the FCC's franchise fee limitation. In Notice of Proposed Rulemaking in Docket No. 18892, 25 F.C.C. 2d 50, 53 (1970), the FCC suggested a fee ceiling of 2 percent of the cable system's gross revenues, in order to prevent the levy of excessive fees which would hinder cable's development and the achievement of national communications goals. The FCC was aware that some existing franchises provided for higher fees and recognized that some allowance should be made for these pre-existing arrangements.

We recognize that some communities have bargained for larger percentages of receipts. These arrangements could be grandfathered if not in the core city of the 100 largest markets. 25 F.C.C. 2d at 53 (Emphasis added)

Thus, as early as 1970, the FCC suggested grandfathering existing fee "arrangements", not any fees which might later be imposed on existing systems. The same purpose was expressed in a 1971 Letter of Intent, 31 F.C.C.2d 115, 138-39 (1971), in which the FCC told Congress that the FCC intended to limit franchise fees and explained the grandfather provisions as designed to prevent "minor dislocations" Id at 139. Congress did not object. Consequently, in the 1972 Cable Television Report and Order, 36 F.C.C. 2d 143, 209-10 (1972) ("1972 Cable Report"), the FCC adopted its fee limitation, again explaining that the purpose of the grandfather provision was to prevent "minor dislocations" Id at 210 (See FCC Br. p. 5).

Later in 1972, in its Memorandum Opinion and Order on Reconsideration of the Cable Television Report and Order, 36 F.C.C. 2d 326 (1972) ("1972 Reconsideration"), the FCC again made clear that its purpose in according special transition status was to recognize the justified reliance which had been placed on specific franchise terms, such as fees, negotiated prior to the 1972 Cable Report (See 36 F.C.C. 2d at 366). And in its 1974 Clarification of the Cable Television Rules and Notice of Rulemaking and Inquiry, 46 F.C.C. 2d 175, 197 (1974) ("1974 Clarification"), the FCC reiterated that its purpose was to allow a transition period -- and specifically held that any change in franchise fees would be such a "substantial change" as to "effectively terminate the existing franchise" (See FCC Br., p. 6).

2. Cable Fees in New York State

New York State regulators concerned with the cable television industry have long recognized the danger posed by excessive franchise fees, and have in the past relied on FCC regulation to prevent excesses. Yet the interpretation now favored by CCT would open the door to grossly excessive fees on systems in many communities throughout the state.

In 1970, in a report to the New York Public Service Commission on state regulation of cable television, part of the legislative history of the state cable law, Commissioner William K. Jones observed:

If the immediate objective of government involvement with CATV is the advancement and enlargement of the medium, high franchise fees are counterproductive. Even in the case of a monopoly, any increase in variable costs (such as a gross receipts tax) will result in an increase in price (or a reduction in service) and exert a retarding effect on development of the industry. And until the industry develops, it is of no use to anyone.

Thus, one of the worst methods of selecting the CATV operator for a particular municipality is to auction off the privilege to the system willing to pay the highest percentage of gross revenues to the municipality. This is a clear invitation to slow and limited development. W. K. Jones, Regulation of Cable Television in the State of New York, Public Service Commission, December, 1970, p. 202.

When the state statute creating CCT was enacted in May, 1972, the need to control franchise fees was recognized by the Assembly committee which proposed the legislation -- a committee then chaired by the present Chairman of CCT. The committee's report said:

"In misguided zeal for obtaining economic benefits of the community, franchising authorities tend to bargain for a large share of revenue. . . . In the long run, this has the effect of simply increasing service costs for citizens rather than through negotiation arriving at a plan for a cable system which best serves the community and protects the public interest." Assembly Standing Committee on Corporations, Authorities and Commissions, Cable Television A Public Service - A State Concern, Final Report, April 15, 1972, Legislative Document (1972) No. 31, p. 50.

The Assembly committee concluded that state regulation of municipal franchise fees was unnecessary, in part because cable fees were already subject to federal limits Id. at 64. The report specifically discussed the FCC fee limitation and included the text of the FCC 1972 Cable Report adopting the limitation (Id. at 54-55, E 6-7). In other words, the state lawmakers assumed that the FCC regulation of franchise fees would be sufficient to prevent the evils against which Commissioner Jones and the Assembly committee warned in the above-quoted passages.* Indeed, Section 818 of the New York legislation specifically provided that the sum of the newly-imposed state fee and of local franchise fees should "not exceed the maximum amount permitted by applicable federal law, rules or regulations" New York Executive Law § 818.**

The reliance of the state legislature on federal regulation is evidence that no one in 1972 read the FCC's regulation in the way that CCT now reads it -- for that reading

* CCT has elsewhere opposed the imposition of high franchise fees. In its March 31, 1977 reply comments in FCC Docket No. 21002, CCT stated:

This Commission [CCT] is opposed to excessive franchise fees that would seriously impair the growth of cable television in the State and the ability of the companies to provide quality service. p. 7.

Other experts have also recognized the negative impact of high franchise fees on cable's ability to develop. See e.g., Report to the President of the Cabinet Committee on Cable Communications, 1974, p. 43.

** Section 818 provides in full as follows:

"Nothing in this article shall be construed to limit the power of any municipality to impose upon any cable television company, a fee, tax or charge, provided that any such fee, tax or charge when added to the amount payable to the commission pursuant to section eight hundred seventeen does not exceed the maximum amount permitted by applicable federal law, rules or regulations."

would gravely impair the effectiveness of the federal regulation in New York. It would make the fee limitation wholly inapplicable to any cable system which was in existence before March 31, 1972, and would permit the state and municipalities to impose new fees, unlimited in amount, upon such systems. Dozens of systems in New York alone would be subject to such unrestrained state and local taxation, including both of the systems now operating in Manhattan. No one, including the state regulators, envisioned such an enormous loophole in the federal regulation at the time it was enacted.

3. The Proceedings in the Present Case

So far as we are aware no one ever espoused CCT's present reading of the FCC's grandfather clause until CCT filed its petition for reconsideration in the matter here under review. Most significant, CCT itself gave no hint of this interpretation in its original petition for a declaratory ruling or in the subsequent papers it filed in support of its petition.

CCT's petition, filed January 22, 1975 (S.J.A. 1-31), sought a declaration that the 2 percent franchise fee imposed by New York Executive Law § 817 was "consistent in all respects" (S.J.A. 1) with FCC regulations, raising certain specific issues not relevant to the present appeal. CCT asked the FCC to uphold

* CCT contended that it could properly calculate its 2 percent fee on the basis of "gross annual receipts" as defined by New York law, rather than "gross subscriber revenues" as defined by the FCC and that sufficient justification existed to permit the combined state and local fees to rise to 5 percent, rather than the 3 percent limit established by the FCC for most cases. The FCC ruled in CCT's favor on both of these issues. (J.A. 10-13).

CCT's right to collect its 2 percent fee from "every cable television company" in New York State (See S.J.A. 3). CCT did not say, as it naturally would have said had it then devised its present argument, that systems in existence before March 31, 1972 were not protected by any fee limitation and therefore posed no problem.

Comments on CCT's petition filed by NYCTA and by another intervenor, Manhattan Cable Television, Inc., specifically called attention to the situation of "grandfathered" systems in New York (S.J.A. 59, 61, 62, 86-89). CCT, however, in responding to those comments, did not suggest that there was any relevant difference between systems which were grandfathered and those that were not (See S.J.A. 71). CCT obviously assumed, as the FCC and the cable television industry have always assumed, that the grandfather clause is relevant only to fees imposed before March 31, 1972.

It was only after the FCC's original ruling on July 9, 1976, that CCT for the first time asserted, in a so-called petition for "reconsideration", that the language of the FCC's ruling "appears to 'grandfather' cable television systems, not fees" (J.A. 38; emphasis added). Now that this reading has been rejected by the FCC, CCT urges it upon this Court. Astonishingly, CCT now claims that it and others relied for years on what it now calls the "plain meaning" of the FCC's rule. The record shows that this meaning was not "plain", even to CCT, for more than four years after the rule took effect.

Argument

I

THE FCC'S INTERPRETATION OF ITS OWN RULE IS ENTITLED TO CONTROLLING WEIGHT

In this proceeding, CCT challenges the FCC's interpretation of its own rule. The scope of review of that interpretation by this Court is extremely limited. As the Supreme Court observed in Udall v. Tallman, 380 U.S. 1, 16 (1965):

When faced with a problem of statutory construction, this Court shows great deference to the interpretation given the statute by the officers or agency charged with its administration. . . . When the construction of an administrative regulation rather than a statute is in issue, deference is even more clearly in order.

'Since this involves an interpretation of an administrative regulation a court must necessarily look to the administrative construction of the regulation if the meaning of the words used is in doubt. . . . [T]he ultimate criterion is the administrative interpretation, which becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation'
quoting Bowles v. Seminole Rock & Sand Co., 325 U.S. 410, 413-14 (1945).
(Emphasis added).

CCT, confusing agencies' interpretation of statutes with interpretation of their own regulations (See e.g., CCT Br., pp. 11-12), misconceives the proper standard of review

here.* CCT's brief ignores the crucial point that the FCC's interpretation of the rule it promulgated and is responsible for administering, unless wholly arbitrary, is dispositive and must be respected by the Court. See e.g., Immigration Service v. Stanisic, 395 U.S. 62, 72 (1969); Udall v. Tallman, supra, 380 U.S. at 4; United States v. Whelan, 463 F.2d 1093, 1094 (9th Cir. 1972); United States v. Goldberg, 527 F.2d 165, 172 (2d Cir.), cert. denied, 425 U.S. 971 (1976). An interpretation by the FCC is entitled to the same deference given other agency constructions of their own rules. See e.g., Committee for Open Media v. FCC, 533 F.2d 1, 3 (D. C. Cir. 1976). As this Court stated in affirming the FCC's interpretation of a formula it had adopted for allocating international telegraph traffic:

The Commission's interpretation of a Formula adopted and approved by it after careful consideration -- like other administrative regulations of a responsible governmental agency -- is entitled to great weight if not so unnatural or unreasonable as to ensnare and entrap those governed by it. Western Union Telegraph Co. v. United States, 217 F.2d 579, 581 (2d Cir. 1954)

* All of the cases CCT relies upon involved judicial interpretation of statutes. Malat v. Riddell, 383 U.S. 569 (1966), (CCT's Br., pp. 8-9); Utilities Ins. Co. v. McBride, 315 F.2d 553 (10th Cir. 1963) (CCT's Br., pp. 8-9); Dobbs v. Train, 409 F.Supp. 432 (N.D. Ga. 1975) (CCT's Br., p. 12), United States v. Gibbons, 331 F.Supp. 970 (D. Del. 1971) (CCT's Br., pp. 8, 11), Hoover v. United States, 348 F.Supp. 502 (C.D. Calif. 1972) (CCT's Br., pp. 9, 11). These cases are wholly inapposite here. Moreover, they simply reaffirm the proposition that the construction of statutes is ultimately the responsibility of the court. But, even in statutory interpretation, deference is given to the interpretation by the agency charged with its administration. See e.g., Udall v. Tallman, supra, 380 U.S. at 16 (1965); Unemployment Commission v. Aragon, 329 U.S. 143, 153 (1946).

Applying the proper standard of review, it is evident that the FCC's interpretation of its own rule should be affirmed. The FCC's interpretation is reasonable and effectuates the intent of the rule. The interpretation urged by CCT is the "unnatural and unreasonable" one.

II

THE FCC'S INTERPRETATION IS
REASONABLE

THE FCC construes the grandfather clause of Section 16.31(b) as having grandfathered fees not in compliance with that section which were already being levied prior to March 31, 1972. This construction is clearly reasonable and so must be respected. See e.g., Udall v. Tallman, supra, 380 U.S. at 4, 18.

Under the FCC's interpretation, state and local regulatory authorities were given a generous transition period in which to continue pre-existing fees exceeding the FCC limits before they were required to lower these fees to the range the FCC had determined to be reasonable. This reading of the rule effectuates the FCC's intent, announced when it first proposed a fee limitation, to grandfather "arrangements" which had already been bargained for. Notice of Proposed Rulemaking in Docket 18892, 25 F.C.C. 2d 50, 53 (1970). This construction also comports with the FCC's purpose, announced to Congress in the 1971 Letter of Intent, 31 F.C.C. 2d 115, 139 (1971). Congress did not reject this letter and, in essence, acquiesced in it. The FCC's purpose was reiterated in the 1972 Cable Report, 36 F.C.C. 2d 143, 210 (1972); the clause was designed to alleviate whatever "minor dislocations" the fee limitation and other franchise standards might otherwise cause cable operators and franchising authorities. "Dislocations" are caused by requiring modification of existing arrangements.

To read the rule, as CCT does, to authorize the imposition of additional fees on pre-March 31, 1972 systems during the transition period, would increase dislocations and further exacerbate compliance problems when the transition period ends. It would also make no sense, and be manifestly unfair, to allow increases on grandfathered systems while keeping other systems at the legal rate.

Nor is the FCC's interpretation "unexpected" as CCT contends (CCT Br., p. 15). The FCC's limited purpose of permitting preservation of the status quo ante was manifest from logic and from its explanations in and prior to the 1972 Cable Report (see p. 4 above). Shortly after the 1972 Cable Report, the FCC removed any possible doubt. Both in its 1972 Reconsideration, 36 F.C.C.2d at 366, and in the 1974 Clarification, 46 F.C.C.2d at 197, the FCC made clear that the intent of grandfathering was to recognize parties' justifiable reliance on agreements negotiated prior to being placed on notice of the FCC's new rules. The FCC's interpretation of the grandfather provision in its fee limitation rule fully satisfied this equitable concern. As the FCC has observed, under the construction urged by CCT "that equitable concept would be destroyed" (J.A. 23) by authorizing the imposition of additional non-complaint fees after the rule was promulgated.

In the 1974 Clarification the FCC made clear that it had only grandfathered fees levied prior to March 31, 1972 and that all non-federal regulatory fees were to be combined in determining compliance with its fee limitation. In determining the reasonableness of the FCC's present interpretation of its

rule, consistency with prior construction deserves substantial weight. See e.g., Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 381 (1969); Udall v. Tallman, supra, 380 U.S. at 17. CCT's brief omits all reference to the 1974 Clarification and fails to mention that the FCC's interpretation was a matter of public record well before CCT ever espoused its contrary view.

Under the interpretation urged by CCT, the FCC would have created a completely arbitrary discrimination between old systems and new systems. CCT claims that while all fees levied on cable systems franchised after March 31, 1972 were subject to federal limits, the FCC gave free rein to impose new fees exceeding the limits on any system simply because it was in operation prior to March 31, 1972. Thus, rather than protecting reasonable expectations based on pre-existing arrangements, under CCT's construction, the FCC affirmatively discriminated against older cable systems, by inviting state and local authorities to exact any new levies they pleased from these systems during a period initially set at five years, and now extending until as late as 1987. CCT's interpretation, unreasonable on its face, directly contravenes the purpose of the fee limitation and the realities against which the grandfather provision should be viewed.

III

THE "PLAIN MEANING RULE" IS NOT
 GROUNDS FOR REVERSING THE FCC'S
RULING

With the agency's interpretation and common sense both against it, CCT is reduced to arguing what it contends is the "plain" meaning of the FCC's words. Indeed, the word "plain" appears at least once on virtually every page of the argument in CCT's brief. But even if the rule, read literally, might appear to have grandfathered "systems" rather than "fees", as Chief Judge Learned Hand admonished, "[t]here is no surer way to misread any document than to read it literally." Guisseppi v. Walling, 144 F.2d 608, 624 (2d Cir. 1944). To avoid an illogical result, "the tempering influence of reasonable construction must be applied" Knapp v. McFarland, 462 F.2d 935, 939 (2d Cir. 1972). Thus, even if CCT's construction is the more literal, the FCC's should be affirmed since it effectuates the policy underlying the rule. See e.g., Puget Sound Truck Lines, Inc. v. United States, 556 F.2d 959, 961 (9th Cir. 1977), petition for cert. filed, 46 U.S.L.W. 3138 (U.S. August 17, 1977) (No 77-272).

There can no longer be any doubt that in construing a statute or regulation, a court should not confine itself to the bare words used, but must interpret the words so as to effectuate the drafter's intent. See, e.g., Heydon's Case, 3 Co. 7a (1584); Lynch v. Overholser, 369 U.S. 705, 710 (1962); Markam v. Cabell, 326 U.S. 404, (1945); Knapp v. McFarland, 462 F.2d 935, 939 (2d Cir. 1972); Cawley v. United States, 272 F.2d 443, 445 (2d Cir. 1959). As this Court recently observed in declining to interpret literally a provision in the Federal Rules of Evidence:

Our function as an interpretive body is, of course, to construe legislative enactments in such a way that the intent of the Legislature is carried out.

* * * * *

[T]his Court has not been loath to allow literalness to fall prey to 'reasonable construction' to effectuate legislative intent. . . .
United States v. Oates, No. 76-1100
(2d Cir., decided June 3, 1977),
Slip Op. pp. 6447, 6449.

The FCC's adoption of a "reasonable construction" here is not barred by the "plain meaning rule."

Conclusion

The FCC order should be affirmed.

Dated: September 30, 1977

Respectfully submitted,

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AFFIDAVIT

STATE OF NEW YORK)
 : ss.:
COUNTY OF NEW YORK)

SUSAN P. CARR, being duly sworn, deposes and
says:

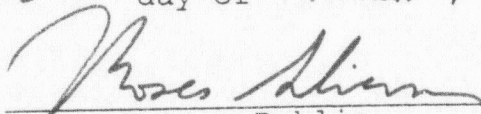
I am not a party to the action, am over 18 years
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10028.

On September 30, 1977, I served the attached Brief
for Intervenor New York State Cable Television Association and
Supplementary Joint Appendix upon the following attorneys at
the addresses designated by them for that purpose: Federal
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1919 M Street, N.W., Washington, D.C. 20554 (Attn: Gregory M.
Christopher, Esq.) and United States Department of Justice,
Washington, D.C. 20530 (Attn: Robert B. Nicholson, Esq.)

Said service was made by depositing true copies of
the attached Brief for Intervenor New York State Cable Tele-
vision Association and Supplementary Joint Appendix enclosed
in a postpaid properly addressed wrapper, in an official
depository under the exclusive care and custody of the United
States Post Office Department within the State of New York.

Sworn to before me this

30th day of September, 1977.



Notary Public

MOSES SILVERMAN
Notary Public, State of New York
No. 4517455
Qualified in New York County
Commission Expires March 30, 1980